QUESTION PRESENTED

Whether the retroactive application of Florida Statute § 944.277 (Supp. 1992), by withdrawing credits previously allocated petitioner for release solely to alleviate prison overcrowding, increases the punishment for petitioner's 1985 offense of conviction in violation of the Ex Post Facto Clause of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
1. Overview.....	2
2. Florida's Overcrowding Statutes - An Exercise in Prison Crisis Management.....	3
3. The Proceedings Below.....	9
SUMMARY OF ARGUMENT.....	14
ARGUMENT.....	17
I. THE 1992 AMENDMENTS TO FLORIDA STATUTES SECTION 944.277 WHICH RETROACTIVELY REMOVED CERTAIN CLASSES OF VIOLENT OFFENDERS FROM ELIGIBILITY FOR RELEASE TO ALLEVIATE PRISON OVERCROWDING DID NOT INCREASE PETITIONER'S PUNISHMENT AND, THEREFORE, DID	

NOT VIOLATE THE EX POST FACTO CLAUSE..... 17

A. Provisional Credits And Other Forms of Overcrowding Gain-Time Are Neither An Integral Part of the Punishment Attached to Petitioner's Crimes Nor A Critical Determinant of the Length of Petitioner's Incarceration Because Their Are Part of Administrative Procedures Designed To Alleviate Prison Overcrowding, A Phenomenon Created By Factors Unrelated to a Prisoner's Punishment..... 18

B. At the Time Petitioner Committed His Crimes, Petitioner Could Not Have Reasonably Expected That He Would Benefit From A Non-Existent Statute..... 26

II. UNDER THE *LINDSEY-WEAVER-MILLER* RULE, FLORIDA'S OVERCROWDING STATUTES DO NOT AFFECT A PRISONER'S PUNISHMENT WITHIN THE MEANING OF THE *EX POST FACTO* CLAUSE..... 30

III. THE EX POST FACTO CLAUSE DOES NOT PROTECT A RIGHT TO THE CONTINUED MISAPPLICATION OF LAW. THEREFORE, BECAUSE PETITIONER WAS UNLAWFULLY AND ERRONEOUSLY DISCHARGED FROM CUSTODY AFTER HE WAS DEEMED INELIGIBLE FOR EARLY RELEASE UNDER THE 1992 ACT, THE FDOC WAS ENTITLED TO RETURN THE

PETITIONER TO PRISON TO COMPLETE THE REMAINDER OF THE SENTENCE IMPOSED..... 34

A. The Exclusionary Provisions of Florida's Overcrowding Statutes, As Part of An Administrative Mechanism To Control Prison Overcrowding, Were Properly Construed As Retroactive Statutes..... 34

B. The Corrected Interpretation of the 1992 Act By the Florida Attorney General and the Subsequent Judicial Validation of That Interpretation Did Not Unconstitutionally Extend The Retroactive Reach of the Statute..... 37

C. The *Ex Post Facto* Clause of the Constitution Does Not Confer A Right to the Continued Misapplication of Law..... 39

CONCLUSION..... 41

TABLE OF AUTHORITIES

CASES Page

Beazell v. Ohio, 269 U.S. 167 (1925).....17,21,29
Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988).....passim
Bouie v. Columbia, 378 U.S. 347 (1964).....37,38
Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988).....35
Caballery v. United States Parole Commission, 673 F.2d 43, *cert. denied*, 457 U.S. 1136 (1982).....39,40
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).....16,17
California Dept. of Corrections v. Morales, 115 S.Ct. 1597 (1995).....passim
Carson v. State, 489 So.2d 1236 (Fla. 2 Dist. Ct. App. 1986).....13,39
Collins v. Youngblood, 497 U.S. 37 (1990).....30
Cortinas v. United States Parole Commission, 938 F.2d 43 (5th Cir. 1991).....39,40
Costello v. Wainwright, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976).....4,28
Douglas v. Buder, 412 U.S. 430 (1973).....37
Dugger v. Rodrick, 584 So.2d 2 (Fla. 1991), *cert. denied sub nom. Rodrick v. Singletary*, 502 U.S. 1037 (1992).....passim
Eidson v. State, 67 So.2d 248 (Fla. 1 Dist. Ct. App. 1995).....6,21
Gant v. State, 642 So.2d 84 (Fla. 2 Dist. Ct. App. 1994).....21
Giles v. State, 462 So.2d 1063 (Ala.Cr.App.1985).....39
Glenn v. Johnson, 761 F.2d 192 (4th Cir. 1985).....39,40
Green v. Christiansen, 732 F.2d 1397 (9th Cir. 1984).....39
Griffin v. Singletary, 638 So.2d 500 (Fla. 1994).....passim

TABLE OF AUTHORITIES (cont'd)

Page

Herring v. Singletary, 879 F.Supp. 1130 (M.D. Fla. 1985).....21,38
Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995) *cert. denied* 116 S.Ct. 715 (1996).....14,21,29
Johnson v. State, 561 So.2d 1254 (Fla. 2 Dist. Ct. App. 1990).....39
Landgraf v. USI Film Prods., 114 S.Ct. 1483 (1994)...35
Lindsey v. Washington, 301 U.S. 397 (1937).....31
Marks v. United States, 430 U.S. 188 (1977).....37,38
Miller v. Florida, 482 U.S. 423 (1987).....31
Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989).....29
State v. Coleman, 149 Fla. 28, 5 So.2d 60 (1941).....40
State v. Moore, 630 So.2d 1235 (Fla. 2d DCA 1994)...21
Stephens v. Thomas, 19 F.3d 498 (10th Cir. 1994).....39,40
Sutton v. Strickland, 531 So.2d 1009 (Fla. 1 Dist. Ct. App. 1988).....13,39
Tripp v. State, 622 So.2d 94 (Fla. 1993).....21
Weaver v. Graham, 450 U.S. 24 (1981).....18,20
Webb v. State, 630 So.2d 674 (Fla. 4 Dist. Ct. App. 1994).....21
White v. Pearlman, 42 F.2d 788 (10th Cir. 1930).....40

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. art I, § 10, cl.1.....2,13,17
1983 Fla. Laws ch. 83-131.....5,7
1989 Fla. Laws ch. 89-100.....8,11,36
1989 Fla. Laws ch. 89-526.....36
1992 Fla. Laws ch. 92-310.....8,11

Page

1993 Fla. Laws ch. 93-406.....7,8,9
The Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131.....25
§ 775.082, Fla. Stat. (1985).....26
§ 944.023, Fla. Stat. (Supp. 1992).....4
§ 944.275, Fla. Stat. 5,19,24,25
§ 944.275(1), Fla. Stat. (1983-1995).....5
§ 944.275(1), Fla. Stat. (1985).....26
§ 944.275(2)(a), Fla. Stat. 11
§ 944.275(3)(a), Fla. Stat. 11
§ 944.275(4)(a), Fla. Stat. 20
§ 944.275(4)(a), Fla. Stat. (1985).....5,9,27
§ 944.275(4)(b), Fla. Stat. (1985).....5,9,27
§ 944.275(4)(c), Fla. Stat. (1985).....6
§ 944.275(5), Fla. Stat. 5
§ 944.276, Fla. Stat. (1987).....5
§ 944.276(1), Fla. Stat. 7,19
§ 944.277, Fla. Stat. (Supp. 1988).....8,19
§ 944.277, Fla. Stat. (1989).....36
§ 944.277, Fla. Stat. (Supp. 1992).....1,2,19
§ 944,277(1), Fla. Stat. (Supp. 1992).....7,13
§ 944.277(1)(h), Fla. Stat. (Supp. 1992).....8,11,36
§ 944.277(1)(i), Fla. Stat. (1989).....10
§ 944.277(1)(i), Fla. Stat. (Supp. 1992).....8,11,36
§ 944.278, Fla. Stat. (1993).....8,9,10,19
§ 944.28, Fla. Stat. 5
§ 944.598, Fla. Stat. (1983).....7,19
§ 944.598, Fla. Stat. (1985).....27
§ 944.598(1), Fla. Stat. 7
§ 944.598(2), Fla. Stat. (1985).....28
§ 944.598(3), Fla. Stat. (1985).....28
§ 944.598(4), Fla. Stat. (1985).....28

Page

§ 947.146, Fla. Stat. (1989).....9,36
§ 947.146(4)(i), Fla. Stat. (Supp. 1990).....36
Fla. R. Crim. P. 3.701.....26
Fla. R. Crim. P. 3.701(bz)(5)(1985) (reprinted in *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines)*, 468 So.2d 20 (Fla. 1985).....23
Fla. R. Crim. P. 3.988.....26

OTHER AUTHORITIES

1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).....8,12,36
Corrections Overcrowding Task Force, *Final Report and Recommendations (1983)*.....28
Senate Staff Analysis and Economic Impact Statement - SB 3A.....23
Senate Staff Analysis and Economic Impact Statement - SB 644.....22

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-7452

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, ROBERT BUTTERWORTH
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT MATHIS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The *Ex Post Facto* Clause of the United States Constitution, Article I, Section 10, clause 1, provides in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . . ."

2. The provisions of § 944.277, Fla. Stat. (Supp. 1992) have been set out in Petitioner's Appendix A. All other statutory provisions of Florida Statutes relevant to this case have been lodged by the petitioner under separate cover.

STATEMENT OF THE CASE

1. Overview

The petitioner is a prisoner in the custody of the Florida Department of Corrections (FDOC). Respondent Mathis is the Florida official who held petitioner in custody at the time he filed his petition for writ of habeas corpus with the federal district court in Florida. Respondent Butterworth is the Attorney General of Florida.

This case involves a challenge to Florida's cancellation of 1,860 days of "provisional credits" allocated to petitioner because of prison overcrowding. These credits are one of a series of four overcrowding control mechanisms used by Florida to maintain its prison population under a cap mandated by a federal consent decree. When necessary to reduce the prison population, these credits, in limited amounts, were allocated to a pool of statutorily eligible inmates when a triggering threshold was reached.

In October 1992, because of overcrowding, petitioner was released prior to reaching his actual release date.[1] The FDOC released the petitioner, and others with like offenses, based upon its initial interpretation of the 1992 amendments to the provisional credits statute, s. 944.277, that the petitioner remained eligible for overcrowding release. However, in December 1992, the Florida Attorney General determined that the 1992 Florida Legislature in fact had intended to remove petitioner and

[1] The October 1992 release was based upon a provisional release date forecast for prison overcrowding needs through the periodic allocation of provisional credits.

similar offenders from eligibility for overcrowding release by retroactively cancelling previously allocated credits.[2] The Florida Attorney General's interpretation was later upheld by the Supreme Court of Florida.[3] Because the petitioner was determined statutorily ineligible for release, he was returned to state custody to serve the remainder of his sentence.

Petitioner challenged the cancellation of credits and his return to custody through federal habeas corpus proceedings, alleging a violation of the *Ex Post Facto* Clause. The United States District Court for the Middle District of Florida denied the petition and the Circuit Court of Appeals for the Eleventh Circuit declined review. In May 1996, this Court granted the petitioner's petition for writ of certiorari to determine whether the 1992 legislative cancellation of the petitioner's overcrowding credits violated the *Ex Post Facto* Clause of the U. S. Constitution.

2. Florida's Overcrowding Statutes - An Exercise In Prison Crisis Management.

Since the early 1970s, the Florida prison system has battled a burgeoning prison population. In 1972, a class action brought in the federal district court in Jacksonville, Florida, sought to close Florida's prison system to additional admissions and to reduce the existing population

[2] 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[3] *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994).

to acceptable constitutional levels.[4] The prison population reached such crisis levels by 1974 that the FDOC's secretary three times temporarily closed the system to new admissions.[5] In 1975, as a result of continued overcrowding, the federal district court enjoined the FDOC to lower its prison population to acceptable levels.[6] Eventually, in 1980, the FDOC entered into a consent agreement which capped the prison population and established a lawful capacity which the Florida prison population could not exceed without federal court intervention.[7]

Florida sought ways to confront the seemingly unstemmable flood of prisoners. In June 1982, when the prison population threatened to extend beyond its federally mandated cap, the Governor called a special session of the legislature. Lodg. Doc. 76. During this session, the Florida Legislature appropriated funds to construct, staff and operate beds to resolve the immediate overcrowding dilemma and created a Corrections Overcrowding Task Force (COTF) to assess long-term solutions. *Id.*

---

[4] *See Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976). This case, originally filed as a challenge to prison medical care, was expanded to include overcrowding concerns after the district court appointed counsel for the class.

[5] *Costello*, 397 F.Supp. at 22.

[6] *Id.*

[7] "Lawful capacity" was defined as "the total design capacity of all institutions and facilities in the state correctional system, increased by one-third." *See* § 944.023, Fla. Stat. (Supp. 1992). The consent decree limitations were enacted by the Florida Legislature as part of the termination of the agreed injunction. *Id.*, n.1.

The COTF recommended comprehensive reform legislation.[8] Lodg. Doc. 74.[9] Among other things, the COTF made three significant public policy recommendations. First, it prescribed replacing the existing indeterminate sentencing system with a system of sentencing guidelines. Lodg. Doc. 73, 112-113. This proposal, it was thought, would not only make sentencing more uniform and meaningful, but would also allow predictability in prison population growth. *Id.* Second, the COTF recommended revamping the archaic gain-time system provided under s. 944.275 to focus less on length of service and more on good behavior and productive activities.[10] Lodg. Doc. 72-74. It was thought that the

---

[8] This legislation became known as The Correctional Reform Act of 1983. 1983 Fla. Laws ch. 83-131. Included in the legislation were provisions for development of a community control program, sentencing reform (i.e., sentencing guidelines), gain-time revision, improved parole and probation efficiency, youthful offender improvement, a new siting process, and an emergency release mechanism. Lodg. Doc. 74.

[9] The petitioner has filed with the Court a compilation of public records which have been designated as "Lodged Documents". For consistency, the respondent has utilized the same citation form as designated by the petitioner.

[10] Florida utilizes three types of gain-time as prison management tools "to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding services." § 944.275(1), Fla. Stat. (1983 - 1995). The first type, basic gain-time, is a lump-sum, automatic award, based upon length of sentence, which is deducted from an inmate's sentence immediately upon incarceration. § 944.275(4)(a), Fla. Stat. Basic gain-time is non-discretionary and may only be forfeited for specified misconduct. § 944.275(5), § 944.28, Fla. Stat. The second type, incentive gain-time, is discretionary and may be awarded on a monthly basis, as earned, for work and other productive activities, such as participation in educational or vocational programs. § 944.275(4)(b),

mandatory gain-time awarded to inmates based upon length of sentence tended to reward more serious offenders with longer sentences and that the complexity and focus of the monthly discretionary gain-time tended to undermine its effectiveness as a prison management tool. Lodg. Doc. 72. Simplifying the gain-time system was also expected to enhance prison population predictability. Lodg. Doc. 73. Finally, the COTF suggested creation of a stop-gap, early release mechanism that would serve as a "safety valve" in the event that the recommended reforms could not bring the prison population under control.[11] Lodg. Doc. 75, 114.

Over time, the Florida Legislature experimented with four "safety valve" overcrowding mechanisms. Each mechanism was crafted to facilitate expedient releases and to minimize risk to public safety.[12] As overcrowding

---

Fla. Stat. The last type of gain-time, meritorious gain-time, is also discretionary, but is only awarded for extraordinary services, such as saving a life or preventing an escape. § 944.275(4)(c), Fla. Stat.

[11] The COTF recognized the overcrowding question as a diverse problem influenced by state population growth, national economic conditions and urban tendencies, which required development of a "long-range plan prospectus." Lodg. Doc. 74. The COTF was well aware of the hazards of relying solely upon the recommended reforms, noting in its report that "the concept of a Sentencing Commission is an untried regulatory mechanism, and while we assume the process will work well, it may not function as intended. * * * Therefore, some mechanism must be set in place to make release judgements should inmate overcrowding outstrip available prison capacity." Lodg. Doc. 114.

[12] Petitioner suggests in his statement of the case that the overcrowding credits, like gain-time under s. 944.275, were earned or awarded for good behavior or productive activities during periods of overcrowding. Brief of Petitioner at 3, n.5. This is not s.. Overcrowding credits were never awarded to promote good behavior. *See Eidson v. State*, 667 So. 2d 248 (Fla. 1st Dist Ct. App. 1995) (credit for

concerns subsided, the Florida Legislature systematically narrowed the pool of offenders eligible for early release. The progression of these statutes was:

- **Emergency Gain-Time - Section 944.598:** Enacted in 1983. Administered by FDOC. Triggered if the prison population reached 98% of lawful capacity up to 1987, and at 99% of lawful capacity up to 1993. Contained no offense-based exclusions. Authorized emergency release based upon incremental reductions of emergency gain-time during first 15 days; additional releases after 15 days limited to inmate population with less than one year remaining to serve. In effect between 1983 and 1993, but never implemented.[13]

- **Administrative Gain-Time - Section 944.276:** Enacted in February 1987. Administered by FDOC. Triggered if the prison population reached 98% of lawful capacity. Contained a limited number of offense-based exclusions for violent and habitual offenders. Authorized overcrowding

---

time served does not include provisional credits or administrative gain-time which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison). Petitioner's suggestion perhaps rests upon the requirement that inmates statutorily eligible for overcrowding release must also be "earning incentive gain-time" before credits could be allocated. This requirement, or its equivalent, appeared in the three overcrowding statutes administered by the FDOC. *See* § 944.276(1), Fla. Stat.; § 944.277(1), Fla. Stat.; § 944.598(1), Fla. Stat.; Lodg. Doc. 17, 19, 26. Because the FDOC did not make individualized reviews to determine the risk to public safety, this requirement served as a risk-reducing factor and nothing more. While the provision may have inspired good behavior, it was incidental to its actual purpose.

[13] *See* § 944.598, Fla. Stat. (1983), Lodg. Doc. 26; 1983 Fla. Laws ch. 83-131; 1993 Fla. Laws ch. 93-406; *see also Blankenship v. Dugger*, 521 So. 2d 1097, 1098 (Fla. 1988).

releases through limited incremental allocations of administrative gain-time. First mechanism to implement overcrowding releases. Repealed effective July 1, 1988. Administrative gain-time allocations were subsequently cancelled for all offenders in custody on June 17, 1993.[14]

• **Provisional Credits - Section 944.277:** Effective July 1, 1988, upon repeal of the administrative gain-time statute. Triggered if the prison population reached 98% of lawful capacity. Contained a more extensive list of offense-based exclusions for violent and habitual offenders. Authorized releases through limited incremental allocations of provisional credits. Included a provision for 90 days of post-release supervision to enhance public safety. Amended in 1989 to exclude murder-related offenses and a variety of offenses against law enforcement and judicial officers. The 1989 exclusions were prospective, for offenses committed on or after January 1, 1990. Amended in 1992 to remove the prospectivity provision from the 1989 act and to cancel provisional credits previously allocated to offenders with murder-related or law enforcement offenses. Statute became inoperational in January 1991 when Florida Parole Commission assumed responsibility for overcrowding releases under s. 947.146. Repealed effective June 17, 1993. Provisional credits previously allocated were cancelled for all offenders in custody on that date.[15]

---

[14] *See* § 944.276, Fla. Stat. (1987), Lodg. Doc. 17; § 944.278, Fla. Stat. (1993); 1993 Fla. Laws ch. 93-406.

[15] *See* § 944.277, Fla. Stat. (Supp. 1988), Lodg. Doc. 19; § 944.277(1)(h),(i), Fla. Stat. (1989), Lodg. Doc. 21; 1989 Fla. Laws ch. 89-100; § 944.277(1)(h),(i), Fla. Stat. (Supp. 1992), Lodg. Doc. 23; 1992 Fla. Laws ch. 92-310; 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), Lodg. Doc. 53-60; § 944.278, Fla. Stat. (1993), Lodg. Doc. 16; 1993 Fla. Laws ch. 93-406.

• **Control Release - Section 947.146:** Enacted in 1989, with an effective date of September 1, 1990. Administered by the Florida Parole Commission. Contains offense-based exclusions similar to provisional credits statute. Authorizes release on fixed date or on advancing date, pursuant to rules. Remains in place as current overcrowding control mechanism.[16]

Florida's prison population stabilized below lawful capacity in December 1994 and no releases for overcrowding have been made since that time.

3. The Proceedings Below.

On April 14, 1986, petitioner Kenneth Lynce pleaded *nolo contendere* to attempted first degree murder, armed burglary of a dwelling, and possession of a firearm and was sentenced to 22 years in the Florida prison system.[17] J.A. 3, 33, 53. These crimes were committed on October 27, 1985. Lodg. Doc. 144-145.

Upon receipt into state custody, the department applied 2,640 days of basic gain-time to petitioner's sentence in accordance with section 944.275(4)(a), Florida Statutes

---

[16] *See* § 947.146, Fla. Stat. (1989).

[17] Petitioner also pleaded to possession and delivery of cocaine in two additional cases and was sentenced to three and one-half years in each case. J.A. 49, 50. However, because the petitioner's release date is controlled by the 22-year term, these sentences are not the subject of this proceeding.

(1985), and established petitioner's initial tentative release date. J.A. 50. During the course of his incarceration, petitioner earned an additional 958 days of incentive gain-time under section 944.275(4)(b), Florida Statutes (1985), for good behavior and productive activities, which further reduced his tentative release date. *Id.*

Following the February 1987 enactment of the administrative gain-time statute, s. 944.276, petitioner was placed in a pool of eligibles for overcrowding release, and was allocated 335 days of administrative gain-time because of overcrowded conditions.[18] J.A. 50. In July 1988, the administrative gain-time statute was replaced by another overcrowding-control mechanism, provisional credits, s. 944.277. Petitioner initially remained eligible for overcrowding release under the provisional credits statute. Because overcrowding conditions persisted, the FDOC allocated 1860 days of provisional credits to petitioner between the inception of the statute in July 1988 and January 1991, when the responsibility for overcrowding releases was assumed by the Florida Parole Commission. J.A. 50.

In 1989, the Florida Legislature amended the provisional credits statute, s. 944.277, to exclude inmates convicted of murder or attempted murder offenses.[19] The amendment was applied prospectively to offenders with crimes

---

[18] Petitioner's administrative gain-time was cancelled on June 17, 1993, pursuant to § 944.278; however, petitioner does not challenge its cancellation in this case.

[19] § 944.277(1)(i), Fla. Stat. (1989).

committed on or after January 1, 1990.[20] However, during the 1992 legislative session, section 944.277 was again amended and the murder offense exclusion was reenacted, effective July 6, 1992.[21] The 1992 amendment also eliminated the prospectivity provision for the murder offense exclusion included in the 1989 version of the statute.[22]

The FDOC, no longer responsible for overcrowding releases, gave limited effect to the 1992 Act and failed to cancel credits for the excluded categories contained in s. 944.277(1)(h) and (i) to remove these offenders from overcrowding release eligibility. On October 1, 1992, petitioner was discharged from custody prior to reaching his tentative release date,[23] in spite of his ineligibility for provisional overcrowding release. J.A. 50.

The FDOC's failure to properly implement the retroactivity provisions of the 1992 Act was not detected until after petitioner's release. In December 1992, when questions arose about the FDOC's authority to grant overcrowding releases to inmates convicted of murder related offenses, the FDOC sought the opinion of the

---

[20] *See* 1989 Fla. Laws ch. 89-100.

[21] § 944.277(1)(i), Fla. Stat. (Supp. 1992); 1992 Fla. Laws ch. 92-310.

[22] Id.

[23] A tentative release date is the projected date of release calculated by subtracting all jail credit awarded by the sentencing court as well as all basic gain-time awarded upon incarceration and all incentive gain-time earned thereafter. § 944.275(2)(a), (3)(a), Fla. Stat.

Florida Attorney General. After a review of all of the 1992 provisions of s. 944.277, the Florida Attorney General concluded that the offense-based exclusions contained in s. 944.277(1)(h) and (i) applied retroactively and further required that provisional credits previously allocated for offenders excluded under these two provisions be cancelled in order to give full effect to the statute's ineligibility provisions.[24]

The FDOC immediately cancelled all provisional credits allocated to offenders covered by the 1992 exclusions. Because petitioner had been determined ineligible for early release, the department sought a warrant for his return to custody through the court that originally sentenced petitioner.[25] J.A. 51. On May 17, 1993, the sentencing court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. *Id.* Petitioner was arrested pursuant to this order and returned to custody on June 8, 1993, to complete the remainder of his sentence.[26] J.A. 51.

On August 18, 1994, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. J.A. 2-29. Petitioner alleged that the retroactive cancellation of the provisional credits under the 1992 amendments to section 944.277(1) violated the prohibition against *ex post facto* laws under Article I, Section 10, clause 1 of the United States Constitution. *Id.* Petitioner argued that the revocation of the provisional release credits previously allocated to him and his return to custody was an unconstitutional increase in the punishment for a crime after its commission. J.A. 22-25.

The FDOC opposed the petition, citing a series of state and federal cases which supported the department's position that the overcrowding statutes were procedural in nature, whose sole purpose was to alleviate the administrative crisis of prison overcrowding. J.A. 44-46. On March 14, 1995, a United States Magistrate Judge recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 amendments to section 944.277(1) were adopted merely as a means to relieve prison overcrowding, and, therefore, were not subject to the prohibitions of the *Ex Post Facto* Clause. J.A. 53-60. The

---

[24] 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

[25] Because petitioner was in custody on July 6, 1992, when the amendment became effective and required his removal from early release eligibility, petitioner's credits should have been cancelled on that date. The department determined that the cancellation of the 1860 days of provisional credits would reinstate his tentative release date of November 4, 1997. J.A. 50. Petitioner erroneously states that the retroactive cancellation of the provisional credits resulted in a new release date of May 19, 1998. The 1998 release date reflected in the affidavit cited by petitioner at page 52 of the Joint Appendix was the release date calculated at the time the affidavit was prepared on November 29, 1994 in anticipation of filing a response to the petition before the district court. J.A. 34.

[26] By law, the FDOC was entitled to return petitioner to custody. *See Carson v. State*, 489 So. 2d 1236 (Fla. 2d Dist. Ct. App. 1986) (when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement). Because petitioner's release was through error of the FDOC, he was afforded credit for all time while out of custody. J.A. 52; *Sutton v. Strickland*, 531 So. 2d 1009 (Fla. 1st Dist. Ct. App. 1988) (when an inmate is released by mistake, his sentence continues to run in the absence of some fault on his part).

magistrate judge specifically relied on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct 715 (1996). *Id.* The United States District Court for the Middle District of Florida adopted the magistrate's Report and Recommendation on May 10, 1995, and denied the petition. J.A. 64. Petitioner applied for a Certificate of Probable Cause on June 8, 1995, which was denied by the district court on June 16, 1995. J.A. 65. The petitioner reapplied for a Certificate of Probable Cause to the United States Court of Appeals for the Eleventh Circuit, which was also denied on October 16, 1995. J.A. 66. On January 10, 1996, petitioner filed with this Court a petition for writ of certiorari. J.A. 67. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case involves a Florida inmate (the petitioner) who was initially considered eligible for an early release if necessary to keep Florida's prison population under a federally mandated cap on capacity. Under a prison overcrowding statute not in existence at the time he committed his crime, the FDOC, using the incremental allocation of credits, forecast a provisional date to release the petitioner if overcrowding thresholds so required. Before petitioner reached his actual release date and before the earlier date forecast for release because of prison overcrowding, the Florida Legislature enacted amendments (the 1992 Act) to remove petitioner, and others like him, from eligibility for release because of prison overcrowding, based upon the violent nature of his crime.

Through a misinterpretation of the 1992 Act, the FDOC failed to remove petitioner from eligibility and erroneously and, without statutory authority, released petitioner on the

date forecast for prison overcrowding release. When the misinterpretation of the statute came to light and was corrected, petitioner was reimprisoned to serve the balance of his remaining lawful sentence.

Florida's overcrowding statutes were enacted solely as administrative procedures to control prison overcrowding. The purpose of the overcrowding statutes was two-fold: 1) controlling prison population levels in times of prison overcrowding and 2) minimizing the risk to public safety. The non-punitive purpose of the statutes and the public safety interest at stake required their liberal construction, and their retroactive application. While generally statutes are presumed to apply only prospectively, Florida's overcrowding statutes implicitly operated retroactively in order to effectuate clear legislative purpose.

As stop-gap mechanisms to control prison overcrowding, these statutes were not contemplated to work as a component of the sentencing system or to be incorporated as part of the traditional in-prison gain-time system by which an inmate could reduce his sentence for good behavior. Under Florida law, a prisoner's actual sentence is determined by the interaction of the original sentence imposed under the sentencing guidelines reduced by statutorily authorized gain-time awarded for good behavior. Overcrowding early release credits were not included as part of the statutorily authorized gain-time deductions which are the typical determinants of actual length of incarceration after imposition of sentence because the need for these credits was generated on factors outside of the sentencing scheme which contribute to overcrowding and which are irrelevant to determining appropriate punishment.

At the time that petitioner committed his crime in 1985, the provisional release statute under which he eventually

was allocated early release credits had not been enacted. No overcrowding releases had been made under the predecessor statute in effect when petitioner committed his crimes. While overcrowding persisted during this time, it was addressed primarily by increasing prison capacity. Because of the highly speculative and unpredictable nature of overcrowding, petitioner could not have reasonably expected that overcrowding needs would actually shorten his term of incarceration or provide a "formula" for calculating a new sentencing range on the day he was sentenced.

Allocation of credits under the overcrowding statutes was merely part of a procedure to forecast a possible release date if necessary to continue to meet overcrowding needs. Petitioner accrued no absolute right to the forecasted credits and their withdrawal amounted to no more than removal of a "hope" of possible release.

The *Ex Post Facto* Clause protects against retroactive legislative changes that "inflict a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Not every disadvantage or lost opportunity to take advantage of the provisions for early release will violate this constitutional prohibition. *Cal. Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1062 n.3 (1995). Only those legislative changes which produce more than a "speculative, attenuated" risk of an increase in punishment will violate the Constitution. *Id.* When petitioner committed his crime, the possibility of a reduced term of confinement because of prison overcrowding was so remote that it amounted to no more than a "glimmer of hope". Since release or a reduced term of confinement because of overcrowding could not reasonably be considered a part of petitioner's punishment when he committed his crimes, the deprivation of the

opportunity for overcrowding release cannot have in any real way increased petitioner's punishment.

Petitioner's release from custody occurred as a result of the FDOC's misinterpretation the 1992 Act which removed petitioner's eligibility for overcrowding release. The *Ex Post Facto* Clause does not establish a right to the continued misapplication of law. Petitioner was not reimprisoned to serve an additional five years but only to serve the remainder of his lawful sentence as originally imposed.

ARGUMENT

I. THE 1992 AMENDMENTS TO FLORIDA STATUTES SECTION 944.277 WHICH RETROACTIVELY REMOVED CERTAIN CLASSES OF VIOLENT OFFENDERS FROM ELIGIBILITY FOR RELEASE TO ALLEVIATE PRISON OVERCROWDING DID NOT INCREASE PETITIONER'S PUNISHMENT AND, THEREFORE, DID NOT VIOLATE THE EX POST FACTO CLAUSE.

Article I, §10, of the Constitution prohibits states from enacting *ex post facto* laws. Under the *Ex Post Facto* Clause, a state may not apply retroactively any law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The question of whether a particular legislative change produces consequences sufficient to invoke the prohibitions of the *Ex Post Facto* Clause is a matter of "degree". *Beazell v. Ohio*, 269 U.S. 167 (1925). However, not every legislative change that "disadvantages" an offender or affects a prisoner's "opportunity to take

advantage of the provisions for early release" violates the Constitution. *Cal. Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1602 n.3 (1995). Rather, a law must produce "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S. Ct. at 1603. While no exact formula for determining when a particular legislative change produces a sufficient effect on punishment to fall within the prohibitions of the *Ex Post Facto* Clause, the Court has made clear that the risk of affecting a prisoner's actual term of confinement must be more than "speculative and attenuated". *Id.*

A. Provisional Credits And Other Forms of Overcrowding Gain-Time Are Neither An Integral Part of the Punishment Attached to Petitioner's Crimes Nor A Critical Determinant of the Length of Petitioner's Incarceration Because Their Are Part of Administrative Procedures Designed To Alleviate Prison Overcrowding, A Phenomenon Created By Factors Unrelated to a Prisoner's Punishment.

Any ex post facto inquiry necessarily must begin by examining the parameters of the punishment prescribed by law at the time the crime was committed. This Court has established that a law which provides the opportunity for reductions in sentence may fall within the scope of the *Ex Post Facto* Clause if it is one determinant of a prison term, which, if changed, enhances the effective sentence. *Weaver v. Graham*, 450 U.S. 24, 32 (1981). Petitioner maintains that provisional release credits, like other forms of gain-time which serve to reduce a sentence, is a critical determinant of the length of his incarceration and, therefore, are "part and parcel" of his punishment.

However, petitioner's analysis of the role of overcrowding credits in the sentencing process suffers from the same fatal flaws as those presented by the petitioners in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied sub nom. Rodrick v. Singletary*, 502 U.S. 1037 (1992), and *Blankenship v. Dugger*, 521 So. 2d 1097 (Fla. 1988).

In *Blankenship*, *Rodrick*, and *Griffin*, Florida's highest court considered various ex post facto and due process challenges to changes in Florida's overcrowding control statutes.[27] In each case, the Florida Supreme Court compared the traditional forms of gain-time[28] awarded for good behavior with the various overcrowding credits used by the state to control prison overcrowding. The court drew significant distinctions between the statutes' purposes, nature, operation, and relationship to the sentence imposed. The supreme court noted that gain-time for good behavior, particularly basic gain-time, interacted with the sentence in a quantifiable way and, therefore, became an actual

---

[27] In *Blankenship*, the petitioner, who met the eligibility requirements for overcrowding release under the emergency gain-time statute, § 944.598, challenged the removal of that eligibility upon the 1987 enactment of the administrative gain-time statute, § 944.276. *Blankenship*, 521 So. 2d at 1097. In *Rodrick*, the petitioner challenged the withdrawal of his eligibility for overcrowding release upon enactment of the provisional credits statute, § 944.277. Rodrick had been eligible for early release under two predecessor overcrowding statutes (emergency gain-time and administrative gain-time). *Rodrick*, 584 So. 2d at 3. In *Griffin*, the petitioner challenged the retroactive cancellation of provisional credits under the 1992 amendments to § 944.277 and the later cancellation of administrative gain-time under § 944.278, effective June 17, 1993. *Griffin*, 638 So. 2d at 500.

[28] These forms of gain-time are those granted under § 944.275, Fla. Stat.: basic, incentive and meritorious.

determinant of the expected term of incarceration.[29] These forms of gain-time were used to encourage good in-prison behavior, foster rehabilitation, and encourage work and other productive activities. In stark contrast, the court found that the enabling statutes for overcrowding credits articulated administrative procedures which served the singular purpose of controlling prison overcrowding. *Rodrick*, 584 So. 2d at 3-4; *Blankenship*, 521 So. 2d at 1089. Their issuance was highly speculative and entirely predicated on many outside economic and sociological variables which typically contribute to prison overcrowding. The statutes could not be used by prison officials to promote good behavior or work activities. Of particular importance, the court found that overcrowding credits bore no relationship to the original penalty assigned the crime or the actual penalty calculated under the sentencing guidelines.[30] *Griffin*, 638 So. 2d at 500; *Rodrick*, 584 So. 2d at 2; *Blankenship*, 521 So. 2d at 1097.

---

[29] Basic gain-time is applied as a lump-sum award based upon length of sentence immediately upon incarceration. *See* § 944.275(4)(a), Fla. Stat.; *Rodrick*, 584 So. 2d at 4. Its mandatory application at the commencement of a sentence assures an offender a shorter definitive term of incarceration than imposed by the judge at the time of sentencing. For this reason, it has been considered a significant "factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Rodrick*, 584 So. 2d at 4, citing *Weaver v. Graham*, 450 U. S. at 32, 1010 S. Ct. at 966. Incentive gain-time, while less predictable because of its discretionary and contingent nature, could be hypothetically estimated based upon length of sentence imposed. *Rodrick*, 584 So. 2d at 4.

[30] Overcrowding concerns and credits traditionally have been treated as falling outside of the sentencing process in Florida. The conjectural nature of overcrowding and overcrowding releases prevents these factors from being a reasonable basis for a plea. *Griffin*, 638 So. 2d at 501

Because of the peculiar and highly speculative nature of overcrowding credits and their dedicated purpose, the Florida Supreme Court concluded that the statutes were not subject to ex post facto restrictions because they did not make "more burdensome the punishment for a crime, after its commission." *Rodrick*, 584 So. 2d at 4, citing *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S. Ct. 68, 70 L. Ed. 216 (1925). The Florida Supreme Court's analysis was later adopted by the federal courts. *See Hock v. Singletary*, 41 F. 3d 1470 (11th Cir. 1995); *Herring v. Singletary*, 879 F.Supp. 1130 (N.D. Fla. 1985); *see also* J.A. 44-45, n.5, for a list of unpublished cases.

Like the petitioners in *Griffin* and *Rodrick*, petitioner attempts to equate overcrowding credits, or early release credits, with gain-time awarded for good behavior, which has been considered a determinant part of the penalty attached to petitioner's crime. Brief of Petitioner at 19, n.23. Petitioner cites several sources in an effort to

---

(provisional credits are inherently arbitrary and unpredictable, based solely on the happenstance of prison overcrowding, and cannot possibly be a factor at sentencing or in deciding to enter a plea). Such considerations are not a permissible basis for upward or downward departures from permitted ranges under the sentencing guidelines. *See State v. Moore*, 630 So. 2d 1235 (Fla. 2 Dist. Ct. App. 1994). And overcrowding credits, unlike gain-time provided under § 944.275, may not be credited as as time served against a new sentence imposed upon revocation of probation or community control. *See Tripp v. State*, 622 So. 2d 941 (Fla. 1993); *Eidson v. State*, 667 So. 2d 248 (Fla. 1 Dist. Ct. App. 1995) (credit for time served does not include provisional credits or administrative gain-time which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison); *Gant v. State*, 642 So. 2d 84 (Fla. 2 Dist. Ct. App. 1994); *Webb v. State*, 630 So. 2d 674 (Fla. 4 Dist. Ct. App. 1994).

demonstrate that overcrowding credits, like the traditional forms of gain-time, were considered an integral component of Florida's sentencing guidelines system. However, most of these sources refer to gain-time in a general fashion and do not define what types may be included in the term. Others are taken out of context.

For example, to support his position that all types of gain-time, including overcrowding gain-time credits, were intended to function as a substitute for parole, petitioner points to the Senate Staff Analysis and Economic Impact Statement for SB 644 which discusses fifteen major policy changes in the legislation drafted by the Corrections Overcrowding Task Force (COTF). *See* Brief of Petitioner at 20, n.23. Petitioner focuses on a statement in paragraph 4, which provides "[p]ersons convicted on or after the effective date of the act shall no longer be eligible for parole and shall have their release governed by expiration, *gain-time*, or clemency." (emphasis added) Lodg. Doc. 39. The emergency overcrowding release mechanism, which eventually became known as emergency gain-time, is discussed separately in paragraph 3. The discussion of Florida's law on gain-time is discussed in paragraph 7. From this singular reference to "gain-time" in paragraph 4, petitioner concludes that overcrowding release credits were incorporated into the sentencing guidelines scheme. To the contrary and more significantly, the COTF Report which actually gave rise to the legislation being analyzed clearly distinguishes between the role of the emergency overcrowding release mechanism, as an interim, stop-gap measure, until the new sentencing system could take effect, and the role of "gain-time" as the legislatively authorized means by which sentences may be reduced. (Compare discussion at page v, 70 of the Report [Lodg. Doc. 75, 114] with discussion at pages iii, iv [Lodg. Doc. 72-73]). The discussion in the COTF Report clearly reveals that the

emergency release mechanism was not intended to operate in conjunction with the sentencing scheme, but only if the new sentencing guidelines system did not eliminate the overcrowding problem as planned. *See*, *supra* at 6, n.11.

Similarly, petitioner cites to the Senate Staff Analysis and Economic Impact Statement for SB 3A from February 4, 1987, which discusses the impact of implementing Florida's second generation overcrowding control mechanism, administrative gain-time. The summary first describes the three traditional forms of gain-time -- basic, incentive, meritorious -- which traditionally have served as the exclusive methods by which a term of imprisonment could be reduced by an inmate for good behavior. The emergency overcrowding release statute is mentioned separately, in a different context. Lodg. Doc. 46. As with the emergency gain-time provisions, the staff analyst describes the administrative gain-time overcrowding mechanism as a temporary, stop-gap measure to address intake surges experienced by the FDOC as the result of 1986 directives of the Florida Supreme Court which accelerated the disposition of criminal cases. Lodg. Doc. 47. Nothing in the report supports the conclusion that the terms "early release credits" and "gain-time" may be used interchangeably or that the term "gain-time can be read in all contexts as including overcrowding credits.

Petitioner further points to a passage in the sentencing guidelines promulgated by the Florida Supreme Court in 1985 under the Rules of Criminal Procedure:

> [t]he sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain-time.

Fla. R. Crim. P. 3.701(b)(5) (1985) (reported in *The*

Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--*Sentencing Guidelines*), 468 So. 2d 220, 222 (Fla. 1985) Lodg. Doc. 32. Again, from another singular reference to "gain-time", petitioner concludes that "[s]tate law plainly provides that early release gain-time was an integral part of the punishment imposed for petitioner's offense." Petition of Respondent at 21. Yet there is no definition of what types of "gain-time" may be encompassed by this reference or the significance of the passage itself.[31]

In spite of clear indications to the contrary, Petitioner continues to insist that Florida has including overcrowding credits as part of the traditional gain-time system as a functional part of its contemporary sentencing system. The COTF Report makes abundantly clear that the overcrowding mechanisms were neither a replacement for parole under the previous indeterminate sentencing scheme nor a part of the traditional gain-time system in place for over 100 years. The Florida Supreme Court has repeatedly recognized that early release credits dedicated to controlling prison overcrowding play no role in Florida's sentencing scheme. *Blankenship*, *Rodrick*, *Griffin*, *supra*. Legislative

---

[31] An equally plausible explanation for this reference can be found in Florida Statutes. There is only one enactment entitled "Gain-time" and that is found in § 944.275. Section 944.275 is the legislative authorization for basic, incentive and meritorious gain-time -- the three types of gain-time which the COTF clearly addressed in its report as being the traditional reductions of sentence for good behavior. In contrast, all of the overcrowding "early release credits" were enacted in separate and distinct statutory provisions. Only two of the overcrowding statutes included any reference to "gain-time" (emergency gain-time and administrative gain-time). Petitioner does not explain how "provisional credits" are encompassed in this statutory reference to "gain-time".

history dictates the same result.[32]

Petitioner's contention that Florida intended to include overcrowding credits as an integral part of its contemporary sentencing system is illogical. To include overcrowding credits within the context of the determinant sentences contemplated by the sentencing guidelines undermines uniformity of sentencing, one of Florida's fundamental purposes in enacting the guidelines system. Clearly Florida did not intend to put in place a system of punishment for crimes that provide less punishment to those who offend during times of prison overcrowding than for those whose crimes occur during times of sufficient prison capacity. Petitioner seeks constitutional protection for an illogical and inequitable notion of punishment.

Petitioner's analysis of the role of overcrowding credits in Florida's sentencing process fails to take into account significant state judicial precedent and legislative history which distinguish overcrowding credits from the traditional types of gain-time and clearly define the role of the overcrowding statutes in the sentencing process. Petitioner obscures these important distinctions in an effort to demonstrate a nexus between overcrowding credits and the original sentence imposed. In order to invoke the protections of the *Ex Post Facto* Clause, petitioner must demonstrate that overcrowding credits are a substantial

---

[32] Overcrowding credits evolved exclusively as "stop-gap" release mechanisms that would serve as a "safety valve" in the event that the sentencing reforms enacted under the Correctional Reform Act of 1983 could not bring the prison population under control. Lodg. Doc. 75, 114. The "gain-time" reductions to sentences imposed under the guidelines were specifically addressed by the COTF in drafting the reform legislation and are clearly limited to the three types of gain-time referenced in § 944.275, Fla. Stat. Lodg. Doc. 72-74.

consideration in the sentencing process and, therefore, part of the penalty assigned to his crimes. In the absence of such a nexus, petitioner's ex post facto claim must fail.

The *Ex Post Facto* Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver*, 450 U.S. at 31. The constitutional prohibition protects against enhanced punishment but does not assure a right to less punishment. *Id.* Overcrowding credits were not enacted as part of the sentencing scheme which gave rise to petitioner's punishment. Their creation was to address the highly conjectural and speculative phenomenon of prison overcrowding. The petitioner seeks to invoke a constitutional protection for less punishment. The potential to receive a very early release from incarceration based on the unpredictable phenonmenon of prison overcrowding is precisely the "speculative and attenuated" risk this Court has found insufficient to invoke the constitutional prohibitions of the *Ex Post Facto* Clause. *Morales*, 115 S. Ct. at 1603.

B. At the Time Petitioner Committed His Crimes, Petitioner Could Not Have Reasonably Expected That He Would Benefit From A Non-Existent Statute.

At the time petitioner committed his crimes in October 1985, the parameters of his punishment were governed by § 775.082, Fla. Stat. (1985), and the sentencing guidelines under Fla. R. Cr. P. 3.701 and 3.988, reduced only by gain-time as provided for in § 944.275, Fla. Stat. (1985). Petitioner entered a plea of *nolo contendere* and six months later received a sentence of 22 years in prison for the primary offense of attempted murder. Upon transfer to the

FDOC, petitioner immediately received his mandatory basic gain-time award of 2640 days, roughly reducing his sentence from 22 years to 15 years. § 944.275(4)(a), Fla. Stat. (1985); J.A. 50. Petitioner also became immediately eligible to accrue monthly incentive gain-time; however, because this type of gain-time is purely discretionary, contingent on the wishes of correctional authorities and availability of work and program assignments, and, of course, the special behavior of the inmate, the actual reduction in sentence is not immediately quantifiable.[33] § 944.275(4)(b), Fla. Stat. (1985). Thus, petitioner's punishment on the date he committed his crimes and on the date he was sentenced was in real terms, 15 years, with the possibility that he could achieve an earlier release through monthly gain-time awards.

In April 1986, at the time of petitioner entered his *nolo* plea, the only overcrowding control mechanism in effect was the emergency gain-time statute. § 944.598, Fla. Stat. (1985). Although enacted in 1983, prison population levels never reached the threshold capacity to trigger its operation. *See Blankenship v. Dugger*, 521 So. 2d 1097, 1098 (Fla. 1988). Thus, petitioner had no tangible evidence that he would receive benefit of this statute when he committed his crimes or at the time he pleaded *nolo contendere* to his offense.

Moreover, even if a state of emergency was declared under § 944.598, the maximum benefit petitioner immediately could have realized was an award of 30 days

---

[33] Of course, a hypothetical, "best of all possible worlds" estimate of the reduced sentence can be made based upon maximum awards available by law; however, there is nothing to assure that any inmate will actually achieve this hypothetical release date.

of emergency gain-time. § 944.598(2), Fla. Stat. (1985); Lodg. Doc. 27. If the state of emergency persisted after 15 days, releases were limited to those offenders who were within a year or less of their actual release dates. § 944.598(3)-(4), Fla. Stat. (1985), Lodg. Doc. 27. Because of petitioner's lengthy term, the likelihood that the emergency gain-time statute would have any impact upon petitioner's release from incarceration was most assuredly remote.

Although the advent of the provisional credits statute was over two years away, petitioner nonetheless maintains that he had a reasonable expectation of receiving these specific overcrowding credits.[34] It is doubtful that petitioner could have foreseen the future. When petitioner committed his crimes in October 1985, Florida had been grappling with

---

[34] Overcrowding was not a new phenomenon in Florida. The FDOC had been coping with overcrowding since the early 1970s. *See Costello v. Wainwright*, *supra*. During the years immediately preceding petitioner's crime, Florida had appropriated funds to construct new prison beds to address the dilemma. *See* Corrections Overcrowding Task Force, *Final Report and Recommendations* (1983), Lodg. Doc. 76. Petitioner notes that less than a month before his sentencing, the number of inmates in Florida's state prison system exceeded 98 percent of capacity, the statutory trigger for authorization of provisional release credits, and that prison overcrowding was not soon to go away. Brief of Petitioner at 28, n.34. The fact that Florida's prison capacity reached 98 percent bore no significance at that time. Provisional credits were an unknown commodity, not due for creation for two more years. The triggering mechanism for the emergency release statute remained at 99 percent of capacity. Thus, the 99 percent threshold, and not the 98 percent threshold is the only overcrowding release factor of significance at the time petitioner was sentenced. Petitioner places great reliance on continued overcrowding concerns; however, there was nothing to assure him that Florida would resort to the emergency release mechanism rather than to construct additional prison beds to stave off the latest wave of new admissions, as had been done in the past.

prison overcrowding for over a decade. Yet, not one emergency release had occurred. The likelihood that petitioner would receive benefit of emergency release was remote; and the prospect that he would receive the windfall benefit of a not-yet-existent statute was more remote.

Against this backdrop, Petitioner's contention that continued overcrowding made the award of these credits a certainty stretches credulity. The emergency gain-time statute had never been implemented and no prisoners had been released. Unless petitioner was able to predict the future, petitioner had no legitimate expectation at the time of his crime or his plea that he would receive any sentence reduction as a result of prison overcrowding under the existing statute, let alone a reduction of sentence by credits from a not-yet-existent statute. At most, petitioner possessed a mere hope of release because of prison overcrowding -- not a reality. *See Hock v. Singletary*, 41 F. 3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996).[35] The future allocation of credits under the statute

---

[35] Petitioner points out that the Eleventh Circuit reached opposite conclusions in its decisions in *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989). Petitioner finds these opposite opinions irreconcilable: "If the prospect of possible acquisition of early release credits is not too speculative to undergird reasonable expectations of early release, neither is the award of provisional credits due to prison overcrowding." However, this Court has held that whether a particular legislative change produces consequences sufficient to invoke the prohibitions of the *Ex Post Facto* Clause is a matter of "degree". *Morales*, 115 S. Ct. at 1603, citing *Beazell v. Ohio*, 269 U.S. at 171. And, not every legislative change that "disadvantages" an offender or affects a prisoner's "opportunity to take advantage of the provisions for early release" violates the Constitution. *Morales*, 115 S. Ct. at 1602 n.3 (1995). It was apparently obvious to the Eleventh Circuit the degree to which changes to the two prison management statutes affect a prisoner's

enacted in 1987 and their subsequent cancellation under the 1992 were too attenuated to invoke the protections of the *Ex Post Facto* Clause. *Morales*, 115 S. Ct. at 1603 (the amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause).

II. UNDER THE *LINDSEY-WEAVER-MILLER* RULE, FLORIDA'S OVERCROWDING STATUTES DO NOT AFFECT A PRISONER'S PUNISHMENT WITHIN THE MEANING OF THE *EX POST FACTO* CLAUSE.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court heralded the return of the *Ex Post Facto* Clause to its original intent and meaning. Continuing its refinement in *Morales*, the Court emphasized that it is the "increase in the penalty by which a crime is punishable" which triggers the *ex post facto* prohibitions not just any potential disadvantage occasioned by a prisoner or change that may alter the expected term of confinement. *Morales*, 115 S.Ct. at 1602, n.3; *Collins*, 497 U.S. at 43 (1990). The Court noted that several of its prior opinions suggested that enhancements to the measure of criminal punishment fell within the ex post facto prohibitions because they operated to the "disadvantage" of covered offenders. *Morales*, 115 S. Ct. at 1602, n.3. However, the Court acknowledged

---

punishment is significantly different.

that the proper focus of the *ex post facto* inquiry was not whether a legislative change produces some ambiguous sort of "disadvantage" or whether the change affects a prisoner's opportunity to take advantage of provisions for early release but whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Id.* The Court pointed out that the "disadvantage" language utilized in the *Lindsey-Weaver-Miller* trilogy was unnecessary to the results in those cases, because, in each case, the original criminal penalty had been enhanced.[36]

The most closely analogous case in the *Lindsey-Weaver-Miller* trilogy is *Weaver*. The Court's refinement of

---

[36] In *Lindsey v. Washington*, 301 U.S. 397 (1937), the petitioners had been convicted of grand larceny, and the prescribed penalty for grand larceny was imprisonment for an indeterminate sentence not to exceed fifteen years. After commission of the crimes, but before sentencing, Washington amended the law to require offenders convicted of these crimes to be sentenced to the maximum 15 years in prison, with an earlier release obtainable only through parole. The amendment eliminated any sentence less than 15 years and, thus, the standard of punishment for the Lindseys at sentencing was increased from a range of years to the maximum of 15 years.

In *Miller v. Florida*, 482 U.S. 423 (1987), the Court reviewed a challenge to a change in Florida's sentencing guidelines that increased a presumptive sentencing range for sexual offenders from 3½ to 4½ years to 5½ to 7 years through an alteration in the formula for establishing the presumptive sentencing range by increasing the "offense points" assigned to those crimes. Because the penalty was increased to require imposition of a sentence between 5½ to 7 years, a range which exceeded the original maximum statutory penalty of 4½ years in place on the date Miller committed his crime, the Court found the statutory change violated the *Ex Post Facto* Clause.

The decision in *Weaver* is discussed, *infra*.

Weaver provides the litmus test for determining when a state statute which provides for a prison management mechanism runs afoul of the *Ex Post Facto* Clause. In *Weaver*, the Court considered the effect of changes in Florida's gain-time statutes which retroactively reduced the amount of an automatic, mandatory reduction in length of sentence for prisoners committing crimes before the effective date of the new law. The original statutory provision reviewed required the FDOC to apply a lump-sum award of gain-time based upon length of term imposed when a prisoner was first received into custody. This gain-time was retained by the prisoner so long as he complied with prison rules and state law. Thus, on the date of sentencing (and, more importantly, on the date the crime was committed), an offender's actual prison penalty -that is, his punishment - was calculated as the actual sentence less the award of mandatory gain-time.[37] Because the reduction in the amount of mandatory gain-time raised the level of the lower end of the range of prison terms and made these lower ranges no longer attainable, the Court concluded the "quantum of punishment" had been increased in violation of the *Ex Post Facto* Clause.

Morales teaches that the *Ex Post Facto* Clause is not implicated simply because a state statute retroactively "disadvantages" an offender but rather the law must "produce a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S.Ct. at 1603. Under *Morales*, the statute must affect the

---

[37] In petitioner's case, his 22-year sentence became roughly a 15-year sentence by application of automatic (basic) gain-time. Unlike the petitioner in *Weaver*, petitioner can make no tangible prediction of his penalty based upon overcrowding credits as they are contingent on many factors outside the sentencing process and prison operations.

original punishment and it must produce a sufficient risk of increasing the original punishment.

Petitioner's entire focus is on the potential length of incarceration. "Incarceration is punishment, and longer incarceration a greater punishment" is not the test. At the time petitioner committed his crime, he could have no more than a "glimmer of hope" that overcrowding concerns might afford him the opportunity for very early release from his actual punishment. Unlike the petitioner in *Weaver*, petitioner cannot show that the punishment for his crimes on the date he committed them was something less than the 22 years to which he was actually sentenced, or that 22 years would be affected in the least by overcrowding. Petitioner may not, in retrospect, conclude, that provisional credits allocated at a time well after his crime and imposition of sentence to forecast a provisional release date in anticipation of overcrowding needs increased his original punishment when Florida withdrew his provisionally calculated release in the absence of a need to release him to satisfy overcrowding concerns. The 1860 days of provisional credits allocated to petitioner were no more than components of a projected release - a forecast - made by the FDOC in anticipation of the need to control prison overcrowding. When Florida petitioner's release was no longer warranted in order to satisfy overcrowding concerns, all petitioner suffered was a "lost opportunity". The effect of overcrowding was not tangible, predictable, or calculable on the day petitioner committed his crime. Since overcrowding credits could play no role in his sentence on the day he committed his crime, it could play no role in later increasing his punishment.

Petitioner's "expectation" of unconditional, mandatory release through provisional credits, in the absence of continued overcrowding and the state's need for additional

releases, was not legitimate or shared by the state. Although petitioner Lynce may be disappointed he failed to receive the windfall of early release due to prison overcrowding, he has not been harmed by the state's requirement that he serve his sentence as originally imposed. The very nature of prison overcrowding gave petitioner fair warning that his "glimmer of hope" might not materialize into an earlier release. The protections of the *Ex Post Facto* Clause have not been invoked in this case.

III. THE EX POST FACTO CLAUSE DOES NOT PROTECT A RIGHT TO THE CONTINUED MISAPPLICATION OF LAW. THEREFORE, BECAUSE PETITIONER WAS UNLAWFULLY AND ERRONEOUSLY DISCHARGED FROM CUSTODY AFTER HE WAS DEEMED INELIGIBLE FOR EARLY RELEASE UNDER THE 1992 ACT, THE FDOC WAS ENTITLED TO RETURN THE PETITIONER TO PRISON TO COMPLETE THE REMAINDER OF THE SENTENCE IMPOSED

A. The Exclusionary Provisions of Florida's Overcrowding Statutes, As Part of An Administrative Mechanism To Control Prison Overcrowding, Were Properly Construed As Retroactive Statutes.

Florida's overcrowding statutes are administrative procedures enacted to regulate prison population levels when new admissions exceed lawful capacity. *See Griffin, Rodrick, Blankenship, supra.* In implementing these statutes, the Florida Legislature crafted the statutes to serve a two-fold purpose: 1) controlling prison population levels

in times of prison overcrowding and 2) minimizing the risk to public safety. The non-punitive purpose of the statutes and the public safety interest at stake required their liberal construction, and their retroactive application.

To give full effect to the non-punitive legislative purpose, the FDOC applied the overcrowding statutes, including the provisional credits statute, to the prison population without regard to date of offense. The legislative purpose was clear on the dates of enactment of the various statutes that the exclusions applied in the interest of public safety at the onset of overcrowding and not to some future prison population developed after overcrowding concerns abated. This was not only a reasonable interpretation of how the statutes were to operate but an inescapable one. The retroactive nature of the overcrowding statutes was validated on numerous occasions by Florida's highest court. *See Griffin, Rodrick, Blankenship, supra.*

While generally statutes are presumed to apply only prospectively, *see Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994), in certain instances, statutes, by their very nature and purpose, may implicitly carry retroactive effect in order to effectuate clear legislative purpose. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 223 (1988) (a particular statute may in some circumstances *implicitly* authorize retroactive application). Florida's overcrowding statutes necessarily require implicit retroactive application in order to give full and appropriate force and effect to their legislative purposes.

In light of the retroactive nature of the overcrowding statutes, the Florida Legislature was acutely aware of the need to include explicit language in the statutes only if it intended to achieve prospective application. For this reason, in 1989, when the exclusion for murder-related

offenses was first enacted, the legislature determined the provision should apply only to new offenders and included a specific prospective effective date.[38] Thus, the subsequent reenactment in 1992 of these same provisions, omitting the prospective effective date for sections 944.277(1)(h) and (i), evidenced clear legislative intent that these two exclusions should now apply to all offenders in those categories, including those who were previously eligible.

The 1992 Act followed on the heels of the transfer of responsibility for overcrowding control from the FDOC to the Florida Parole Commission.[39] Offenders like petitioner were ineligible for overcrowding release under the control release statute administered by the commission. *See* § 947.146(4)(i), Fla. Stat. (Supp. 1990). Further legislative action was necessary to completely remove these offenders from overcrowding release eligibility. The 1992 Act embodied that legislative action.

---

[38] *See* 1989 Fla. Laws ch. 89-100; § 944.277, Fla. Stat. (1989), n.2.

[39] In 1989, the Florida Legislature enacted legislation to transfer the responsibility for overcrowding control from the FDOC to the Florida Parole Commission. *See* Ch. 89-526, Laws of Fla., codified as section 947.146, Florida Statutes (1989). Effective September 1, 1990, this transfer of authority allowed an individualized assessment of the risk of release for the inmates deemed statutorily eligible for overcrowding release. Like its predecessor statutes, the control release statute contained an extensive list of offense exclusions. Inmates convicted of murder-related offenses were statutorily ineligible for control release. § 947.146(4)(i), Fla. Stat. (Supp. 1990). No provisional credits were allocated after the Florida Parole Commission commenced control releases in January 1991. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

The interpretation accorded the 1992 Act by the Florida Attorney General was not only foreseeable, it was the only interpretation which could give effect to the legislative purpose in reenacting the provisions.

B. The Corrected Interpretation of the 1992 Act By the Florida Attorney General and the Subsequent Judicial Validation of That Interpretation Did Not Unconstitutionally Extend The Retroactive Reach of the Statute.

The *amicus* Florida Public Defender Association suggests that the reinterpretation of the 1992 Act by the Florida Attorney General and the later ratification of that interpretation by the Supreme Court of Florida in *Griffin*, *supra*, constitutes an retroactive expansion of Florida law which "flies in the face of this Court's ex post facto clause/due process clause jurisprudence." Brief of *Amicus Curiae* at 16. The *amicus* relies on a line of cases which merge the principles of *ex post facto* jurisprudence with principles of due process to prevent the retroactive application of unforeseeable judicial enlargements of criminal statutes.[40] *See Bouie v. Columbia*, 378 U.S. 347 (1964); *Douglas v. Buder*, 412 U.S. 430 (1973); *Marks v. United States*, 430 U.S. 188 (1977). These cases, at most, are of tangential relevance.

---

[40] The *Ex Post Facto* Clause is a limitation upon the powers of legislative bodies and does not of its own force apply to the judicial branch of government. *See Marks v. United States*, 430 U.S. 188, 191, 97 S. Ct. 990, 992, 51 L.Ed.2d 260 (1977). Because fundamental principles of "fair warning" which protect against arbitrary governmental action undergird both the *Ex Post Facto* and Due Process Clauses, the Due Process Clause of the Fourteenth Amendment bars the retroactive application of a judicial construction which enlarges a criminal statute.

In *Bouie*, the primary case cited by the *amicus*, this Court struck down a novel construction of a state criminal trespass statute which the Supreme Court of South Carolina had adopted in affirming the convictions of two black college students who had entered, and declined to leave, a segregated restaurant. The Court held that it violated due process to convict someone based upon a retroactive criminal prohibition only recently defined through judicial construction. *Bouie*, at 354, 84 S. Ct. at 1703. The major premise of *Bouie* and the other cases cited by the *amicus* is that a person should know before he acts what conduct is criminal so that he may make an informed decision as to whether to conform his conduct to the law. For this reason, under the Due Process Clause and not the Ex Post Facto clause, judicial constructions that expand the definitional scope of criminal statutes may not be applied retroactively. *See Marks*, 430 U.S. at 191. But no such issue is presented in this case. The challenged enactment does not define a crime which has been the subject of judicial construction. Rather, the statute removes an eligibility to retain credits allocated as part of an administrative procedure to allow the orderly release of prisons if, and only if, prison population levels exceed capacity thresholds. Thus, petitioner was not presented with the concern of conforming his conduct in some way to the terms of the law even, as his conduct had not bearing on the operation of the law.

The ex post facto question in this case as it relates to petitioner's original crimes is the same whether the ineligibility for credit is applied prospectively or the credits are cancelled retroactively. The change occasioned by the 1992 Act either affects the original punishment or it does not. *See Herring v. Singletary*, 879 F. Supp. 1180, 1184 (N.D. Fla. 1995).

C. The *Ex Post Facto* Clause of the Constitution Does Not Confer A Right to the Continued Misapplication of Law.

The *Ex Post Facto* Clause does not prohibit the correction of a misapplied law. *See Stephens v. Thomas*, 19 F.3d 498, 500 (10th Cir. 1994); *see also*, *Cortinas v. United States Parole Commission*, 938 F.2d 43, 46 (5th Cir. 1991); *Glenn v. Johnson*, 761 F.2d 192, 194-195 (4th Cir. 1985)(holding no *ex post facto* violation where agency conformed to Attorney General opinion correcting misapplication of statute limiting parole until minimum had been served); *Caballery v. United States Parole Commission*, 673 F.2d 43, 47 (2d Cir.), *cert. denied*, 457 U.S. 1136 (1982).

The 1992 Act rendered petitioner ineligible for overcrowding release. The FDOC failed to give full effect to the Act when it continued to allow petitioner's eligibility. When the FDOC released petitioner on the forecast provisional release date, it did so without statutory authority. Petitioner's release was unlawful and Florida was entitled to reincarcerate petitioner to serve the remainder of the sentence as originally imposed.[41]

---

[41] *See Carson v. State*, 489 So. 2d 1236 (2 Dist. Ct. App. Fla. 1986)(when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement); *Johnson v. State*, 561 So. 2d 1254 (2 Dist. Ct. App. 1990)(fact an inmate was mistakenly released from custody before serving a prison sentence did not terminate that sentence). Because petitioner's release was occasioned by the FDOC's erroneous interpretation of the 1992 Act, he was entitled to receive credit for all time spent at liberty. *See Sutton v. Department of Corrections*, 531 So. 2d 1009 (1 D.C.A. Fla. 1988); *Green v. Christiansen*, 732 F.2d 1397 (9th Cir. 1984); *see also Giles v. State*, 462 So.2d 1063 (Ala.Cr.App. 1985); *State v.*

While it is unfortunate that the department's failure to immediately give effect to the 1992 Act necessitated petitioner's return to custody, the FDOC's mistake in releasing him does not implicate the *Ex Post Facto* Clause. *See Stephens*, *Cortinas*, *Glenn*, *Caballery*, *supra*. Given the fact that the FDOC's limited interpretation of the 1992 Act essentially gave it no effect at all, the Florida Attorney General's interpretation that cancellation of credits was required to remove petitioner's eligibility was not only foreseeable, it was inescapable. The *Ex Post Facto* Clause does not afford petitioner the right to enforce a misinterpreted law. *See id.*

While petitioner could have raised other constitutional or state law claims involving his reincarceration after his erroneous release, petitioner is foreclosed from raising such claims now.[42] If the Court ultimately concurs that the retroactive provisions of the 1992 Act fall outside the scope of the *Ex Post Facto* Clause, then petitioner's return to custody and his continued incarceration must stand.

Coleman, 149 Fla 28, 5 So.2d 60 (1941); *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

[42] During the course of the proceedings below, Respondent pointed out that petitioner's return to custody could give rise to additional claims not encompassed by the *ex post facto* challenge, and, therefore, the petition would be subject to dismissal under the exhaustion doctrine. J.A. 36. Petitioner elected to proceed solely on his *ex post facto* claim.

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit Court of Appeals denying the Certificate of Probable Cause to review the denial of the Petition for Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

Susan A. Maher
Deputy General Counsel
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399
(904) 488-2326

Counsel of Record on behalf of Respondent Mathis

August 30, 1996